UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT
Issued to: Arthur J. WEIS 051-48-0124

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2507

Arthur J. WEIS

This appeal has been taken in accordance with 46 U.S.C. SS7702 and 46 CFR SS5.701.

By an order dated 3 February 1989, an Administrative Law Judge of the United States Coast Guard at Houston, Texas ordered an outright suspension, for one month, of Appellant's license and merchant mariner's document, to be followed by a two month suspension of his documents on six months probation. The single specification supporting the charge of misconduct alleged that Appellant, while serving as Master aboard the S/S OMI CHARGER under the authority of the captioned documents, did, from 23 December 1987 to 23 April 1988, fail to lower to the water lifeboat number 1 at least once in each three-month period in violation of 46 C.F.R. SS35.10-5(e)(5). The hearing was held at Port Arthur, Texas, on 8 September 1988, and Appellant was represented by professional counsel. Heard earlier that day was the case of Captain Steven Fox, who was Appellant's successor as Master of the S/S OMI CHARGER. After the close of the Fox hearing and at the commencement of the Weis hearing, it was stipulated by and between Appellant's counsel and the Senior Investigating Officer that the transcripts of both hearings would apply to each case, including all witnesses and exhibits, and that they would be essentially tried in joinder. These stipulations were accepted partly because it was the same vessel and the same counsel representing both the Appellant and Captain Fox.

As a result of the stipulation, the Appellant introduced into evidence ten exhibits and the testimony of five witnesses. Appellant entered a response of DENIAL to the charge and specification as provided in 46 C.F.R. ÷5.527. The Senior Investigating Officer introduced seven exhibits which were admitted into evidence and the testimony of one witness.

The Administrative Law Judge's final order suspending all Appellant's licenses and documents was entered on 3 February 1989. An order authorizing the issuance of a temporary license to Appellant was entered 24 February 1989, in accordance with 46 C.F.R. ÷5.707 and subject to the terms and conditions set forth therein. The Decision and Order was served on the Appellant on 1 March 1989. Appeal was timely filed on 24 February 1989, and perfected on 29 November 1989.

Appearance: Mary Ann Starks, Esq., 1200 Travis, Suite 2020, Houston, Texas 77002.

FINDINGS OF FACT

1. From 23 December 1987 to 23 April 1988, Appellant was the Master of the tanker S/S OMI CHARGER operating under his above-captioned Coast Guard license and document. Appellant's license authorized him to serve as Master of steam and motor vessels of any gross tons upon oceans, while said vessel was in port, at anchor and at sea.

2. The S/S OMI CHARGER, O.N. DN522864, is a tank ship of 632 feet in length and 17,320 gross tons. The vessel is required by its Certificate of Inspection to maintain two lifeboats. (IO EX. 2).

3. The log of the S/S OMI CHARGER for the date of 2 December 1987, establishes that both lifeboats (port and starboard) were lowered to the water on that date while "riding easy" at port. (IO Ex. 3). The lowering of both boats to the water on that occasion, including a fire and boat drill, was completed in about an hour from 1300 to 1400. The same log reveals that on 9 March 1988, only the port lifeboat was lowered to the water and exercised. (IO Ex. 4).

4. Based on a summary compiled by the Investigating Officer, derived from the log of the S/S OMI CHARGER, (IO Ex. 5), there was daylight time, in port, with good weather, from 23 December 1987 to 23 April 1988, when Appellant had the opportunity to lower the lifeboats to the water pursuant to 46 C.F.R. ÷35.10-5(e)(5). According to the summary, there were 30 days of fairly good weather and calm seas in port or at anchor. Considering ten hours to be the approximate daylight working time each day, there were about 300 hours of daylight in which to conduct the estimated one hour exercise.

5. Appellant, by his own admission [TR. 14-15], while serving as the Master of the S/S OMI CHARGER from 23 December 1987 to 23 April 1988, did fail to lower to the water the starboard lifeboat at least once in each three-month period while the vessel was in port, in violation of 46 C.F.R. ÷35.10-5(e)(5). The Administrative Law Judge found Appellant's failure to follow the regulation was misconduct.

MOTION TO TAKE JUDICIAL NOTICE

Pursuant to Rule 201(f) of the Federal Rules of Evidence, Appellant requests, on appeal, that judicial notice be taken of: (a) United States Coast Guard Navigation and Vessel Inspection Circular (NVIC) No. 3-87, 30 January 1987, (b) certified copies of the S/S OMI CHARGER's log for selected dates from the period in question and notes made after the hearing by the Appellant describing his entries, (c) the Beaufort Wind Scale, (d) the 1987 New Standard Tanker Agreement between the Seafarers International Union and Contracted Companies (hereinafter New Standard Agreement), and (e) the well known maritime fact that turning an empty tanker in a channel or a port is safer than turning one which is fully loaded.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. On appeal, Appellant asserts that:

(1) A thorough review of the testimony at the hearing, summaries of the ship's log entries and certified copies of pertinent log entries reveal not one day during which it was "practicable" to perform the drill with the starboard boat.

(2) In charging Captain Weis, the Coast Guard failed to consider the provisions of Navigation and Vessel Inspection Circular (NVIC) 3-87 which addresses the kinds of unavoidable obstacles which excuse literal compliance with 46 C.F.R. ÷35.10-5(e)(5) and which would excuse Captain Weis' actions in this case.

(3) To prove misconduct, the Coast Guard had the burden of showing that Captain Weis' actions fell short of the standard of care referred to in 46 C.F.R. ÷35.10-5(e)(5), requiring strict compliance only "if practicable".

(4) The Administrative Law Judge gave undue weight to the Investigating Officer's summary of the log (IO Ex. 5), which gives the mistaken impression that numerous opportunities existed to lower the starboard boat to the water.

OPINION

I will discuss the issue of judicial notice at the outset. First, since the admissibility of the New Standard Agreement and the

matter of turning a fully laden tanker are not essential to the disposition of this appeal, it is unnecessary to rule on them.

The NVIC is noticeable under 46 C.F.R. ÷5.541 as it was published by the Coast Guard. Official notice may be taken of an agency's own reports on appeal although not formerly marked in evidence. Appeal Decision 460 (DUGAS). See Market St. R.R. Co. v. R.R. Commission of Calif., 324 U.S. 548, 561-62 (1945). Also, agency reports and policy statements, when used against that agency, can be officially noticed. Wisconsin v. Federal Power Commission, 201 F.2d 183 (D.C. Cir. 1952), cert. den. 345 U.S. 934 (1953); Camacho v. Bowling, 562 F. Supp. 1012 (N.D. Ill. 1983); and P. Saldutti & Son, Inc. v. United States, 210 F. Supp. 307 (D.N.J. 1962). The Supreme Court has established that when the agency, acting as decision-maker, takes notice of internal regulations, the agency prosecutors need not be given the notice and opportunity to respond normally afforded by Rule 201(e) of the Federal Rules of Evidence and 46 C.F.R. ÷5.541(b) to the opponent of the proffered regulations. Heckler v. Campbell, 461 U.S. 458, 469-470 (1983). Thus, the NVIC can be considered on appeal.

The Beaufort Scale is, as the Appellant asserts, "... well known within the maritime context and ... capable of accurate and ready verification." (Appellant's Request for Judicial Notice and to Supplement the Record, p. 4). As such, it is noticeable under Rule 201(b) of the Federal Rules of Evidence.

The selected pages of the logbook of the S/S OMI CHARGER offered by Appellant would have been explicitly admissible at the hearing pursuant to 46 C.F.R. ÷5.545(b). However, they will not be considered since the Investigating Officer has not been given an opportunity to rebut their significance on the record as provided in Rule 201(e) of the Federal Rules of Evidence and 46 C.F.R. ÷5.541(b). Essentially, this is a matter of procedural fairness and since the forum for presenting this evidence is the hearing, the extent of review on appeal will be limited to the evidence received at the hearing. Appeal Decision 2314 (CREWS). See also, Appeal Decision 2008 (GOODWIN) and Appeal Decision 1865 (RAZZI). I will not notice the selected log entries and those notes created by the Appellant in reference to the entries.

I

Appellant claims that although he did not conform to the letter of 46 C.F.R. ÷35.10-5(e)(5), this was not misconduct since the regulation contemplates circumstances which excuse literal compliance. Title 46 C.F.R. ÷35.10-5(e)(5) reads in full:

(5) In port, every lifeboat shall be swung out, if practicable, and the unobstructed lifeboats shall be lowered to the water and the crew exercised in the use of the oars and other means of propulsion if provided for the lifeboat. Although all lifeboats may not be used in a particular drill, care shall be taken that all lifeboats are given occasional use to ascertain that all lowering equipment is in proper order and the crew properly trained. The Master shall be responsible that each lifeboat is lowered to the water at least once in each 3 months.

Appellant contends the "if practicable" modifier allows for circumstances which excuse performance of the duty to lower the boats at least once in each three months. Appellant refers to rough weather, the unavailability of the crew, heavy currents and berthing arrangements as factors which made the exercise of the starboard lifeboat impractical during his entire 123 day tenure as master of the S/S OMI CHARGER.

However, the Administrative Law Judge correctly observed that the duty on the Master to lower the lifeboats to the water at least once every three months, as required in the last sentence of 46 C.F.R. ÷35.10-5(e)(5), is absolute since it uses the resolute language "...

shall be responsible that each lifeboat is lowered... " [Emphasis added]. Decision and Order p. 24. The Administrative Law Judge concluded, "It means at least once in each three months, the Master will do this in port. 'If practicable' does not mean he never has to do it even once in the three-month period". Id. I concur with the Administrative Law Judge that, even where lowering lifeboats to the water may not be practicable, those circumstances do not relieve the burden upon the Master to ensure that such a drill takes place quarterly.

The phrase "if practicable", in the first sentence of 46 C.F.R. ÷35.10-5(e)(5), does not refer to the duty to lower lifeboats every three months. This phrase cannot reasonably be interpreted to apply to the last sentence. The plain meaning of the regulation makes the duty to lower the lifeboats mandatory. There is no law or accepted practice of mariners which can be construed to conflict, modify or condition the affirmative language of the regulation.

The main purpose behind the Fire and Emergency Requirements is to ensure the safety of all persons aboard merchant vessels through emergency training. Where the primary rationale for the regulation is safety, the rule will be given the broadest interpretation possible so long as it is not an unreasonable construction:

First, safety regulations should be broadly construed to effectuate their underlying purpose. Appeal Decision 1918 (STUART), aff'd NTSB Order EM-31, 2 NTSB 2644. Second, language in a regulation should not be given a strained or unreasonable meaning. Appeal Decision 2274 (SMART).

Given the importance of ensuring adequate training with lifesaving equipment, it is not unreasonable to interpret the Fire and Emergency Requirements of 46 C.F.R. ÷35.10 as imposing a mandatory obligation on Masters to conduct complete quarterly lifeboat drills.

II

Appellant claims that the circumstances which made it impractical to lower the lifeboats were recognized in NVIC 3-87 as valid excuses to literal compliance with the regulations. Appellant's argument fails for two reasons.

First, there is nothing in the NVIC suggesting less than the absolute duty to lower the lifeboats pursuant to 46 C.F.R. ÷35.10-5(e)(5). The NVIC provides, in pertinent part, at pp. 9-10:

3 Practice Musters and Drills

3.7 ... all such lifeboats shall be lowered at least once every three months.
3.8 ... In all cases this requirement shall be complied with at least once every three months.

The NVIC also states that: "In addition to lowering, each lifeboat and each rescue boat must actually be launched and maneuvered in the water once every three months". Id., at p. 4.

Second, the NVIC does not directly pertain to the Coast Guard regulation in question. It was issued in response to questions from industry regarding the implementation of 1983 SOLAS amendments on lifesaving appliances and arrangements. The NVIC was an attempt to clarify how this international agreement affected the industry's obligations; it was not a response to any perceived ambiguity in 46 C.F.R. ÷35.10.

III

Appellant claims that prior to finding misconduct, the Coast Guard must prove a violation of the standard of care applicable to a prudent mariner. Appellant refers to "The standard of care alluded to

in the regulation by the term 'if practicable' ..." as that to which Masters are held. (Appellant's Brief p. 4). Appellant's contention is unfounded since substantial evidence of a violation of a duly established rule is per se misconduct. Appeal Decision 2341 (SCHUILING). See also, Appeal Decision 2445 (MATHISON), aff'd Commandant v. Mathison, NTSB Order No. EM-146; and Appeal Decision 2248 (FREEMAN). Title 46 C.F.R. ÷5.27 defines "Misconduct" as "... human behavior which violates some formal, duly established rule. ... It is an act which is forbidden or a failure to do that which is required". Title 46 C.F.R. ÷35.10-5(e)(5) is a duly established rule.

Further evidence that this regulation is to be strictly en forced without regard to extenuating circumstances is found in 46 C.F.R. ÷35.10-5(g), which reads:

Any neglect or omission on the part of the officer in command of such vessels to strictly enforce the provisions of this section shall be deemed cause for proceedings under the provisions of R.S. 4450, as amended (46 U.S.C. 239)1, looking to a suspension or revocation of the license of such officer.

Thus, Appellant's failure to follow the regulation, by his own admission (TR. 14-15), was misconduct. This admission, as substantial evidence of a reliable and probative nature, was sufficient to support the Administrative Law Judge's finding of misconduct, as required by 46 C.F.R. ÷5.63.

Even were the Appellant correct in asserting that the standard of care required for finding a violation of 46 C.F.R. ÷35.10-5(e)(5) was one of "practicability", the Administrative Law Judge's findings that,"... the summary in evidence of good weather with daylight hours in port and at anchor show that Respondents had such opportunity and numerous hours when it was practicable but they did not perform this important task", are dispositive. Decision and Order p. 26. Findings of fact will not be disturbed on appeal where there is no showing that they are clearly erroneous or inherently incredible. Appeal Decision 2395 (LAMBERT), See also Appeal Decision 2333 (AYALA) and Appeal Decision 2302 (FRAPPIER).

1 The relevant provisions of 46 U.S.C ÷239 regarding the power vested in the Coast Guard to suspend and or revoke merchant mariner licenses and documents is now embodied in 46 U.S.C. ÷7703.

IV

Also, Appellant challenges the weight the Administrative Law Judge afforded the Investigating Officer's summary of the log (IO Ex. 5). The Administrative Law Judge made the ultimate finding, in accord

with the Investigating Officer's summary that there was adequate time in which it was practicable for Captain Weis to conduct the drills. It is not essential to the disposition of this appeal to reassess the value of the summary as evidence since the Appellant's admission alone amounted to substantial evidence of a reliable and probative nature sufficient to find misconduct. Nevertheless, the amount of weight to be accorded to any particular evidence is solely within the province of the Administrative Law Judge and will not be disturbed unless inherently incredible. Appeal Decisions 2465 (O'CONNELL), 2398 (BRAZELL) 2395 (LAMBERT), 2386 (LOUVIERE), and 2282 (LITTLEFIELD).

CONCLUSION

Having reviewed the entire record and considered Appellant's arguments, I find that Appellant has not established sufficient cause to disturb the findings and conclusions of the Administrative Law Judge. The hearing was conducted in accordance with the requirements of applicable regulations.

ORDER

The decision and order of the Administrative Law Judge dated 3 February 1989 at Houston, Texas is AFFIRMED.

MARTIN H. DANIELL
Vice Admiral, U.S. Coast Guard
Vice Commandant

Signed at Washington, D.C., this 6 day of September 1990.

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5 EVIDENCE

5.160 Weight of

-determined by ALJ

5.66 Official Documents

-admissibility of, on appeal

5.67 Official Notice

-agency reports may be used against the agency on appeal

5.69 Outside of record

-

-evidence, not considered on appeal

10 MASTER, OFFICERS, SEAMEN

10.33 Operator

-duty to conduct quarterly lifeboat drills is mandatory

6 MISCONDUCT

6.360 Violation of rule/regulation

-as misconduct

12 ADMINISTRATIVE LAW JUDGE

12.50 Findings

-upheld unless inherently incredible

CITATIONS

Appeal Decisions: 460 (DUGAS); 2314 (CREWS); 2008 (GOODWIN); 1865 (RAZZI); 2274 (SMART); 2341 (SCHUILING); 2445 (MATHIASON); 2248 (FREEMAN); 2395 (LAMBERT); 2333 (AYALA); 2302 (FRAPPIER); 2465 (O'CONNEL); 2398 (BRAZELL); 2386 (LOUVIERE); 2282 (LITTLEFIELD)

NTSB Cases Cited: Commandant v. Mathiason, NTSB Order No. EM-146

Federal Cases Cited: Market St. R.R. Co. v. R.R. Commission of Calif., 324 U.S. 548 (1945); Wisconsin v. Federal Power Commission, 201 F.2d 183 (D.C. Cir. 1952), cert. den. 345 U.S. 934

(1953); Camacho v. Bowling, 562 F. Supp. 1012 (N.D. Ill. 1983); P. Saldutti & Son, Inc. v. United States, 210 F. Supp. 307 (D.N.J. 1962); Heckler v. Campbell, 461 U.S. 458 (1983)

Statutes and Regulations Cited: 46 C.F.R. ÷5.541, ÷5.541(b); 28 U.S.C ÷201(b), ÷201(e); 46 C.F.R. ÷5.545(b); 46 C.F.R. ÷35.10, ÷35.10-5(e)(5), ÷35.10-5(g); 46 C.F.R. ÷5.27, ÷5.63; 46 C.F.R. ÷7703

***** END OF DECISION NO. 2507 *****